

BEFORE THE
SURFACE TRANSPORTATION BOARD



Afton Terminal Railroad

)

)

Finance Docket Number: FD 35390

AMENDED VERIFIED NOTICES OF EXEMPTION
UNDER 49 C.F.R. § 1150.31

ENTERED
Office of Proceedings

MAR 02 2012

Part of
Public Record

By: David C. Dillon
Dillon & Nash, Ltd.
111 West Washington Street
Suite 719
Chicago, Illinois 60602
(312) 782-9025

Afton Terminal Railroad

*Attorney for Applicant
in Finance Docket No. 35390*

Applicant in Finance Docket No. FD 35390

DATE FILED: March 1, 2012

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



Affton Terminal Railroad Company

)
)
)

Finance Docket Number: FD 35390

**AMENDED VERIFIED NOTICE OF EXEMPTION
UNDER 49 C.F.R. § 1150.31**

Pursuant to 49 C.F.R. § 1150.31, *et. seq.* and 49 U.S.C. § 10502(a), Affton Terminal Railroad Company (ATRR), a noncarrier, hereby provides that on November 23, 2011, it filed verified notice of exemption from 49 U.S.C. § 10901 for ATRR's acquisition by operating agreement from Affton Logistics, Inc. (A&R), and operation pursuant to operating agreement with ATRR of approximately 2 mile(s) of existing railroad right-of-way and trackage and transloading facilities owned by Affton Trucking Company, in St. Louis, Missouri ("St. Louis Transload Facility trackage"). ATRR subsequently requested that its Notice of Exemption be placed in Abenence on December 16, 2011. The St. Louis Transload Facility trackage is more specifically described and depicted in Appendix 1-A (description) and Appendix 1-B (map) attached to this notice.

THE AFFTON TERMINAL RAILROAD TRACKAGE IS A LINE OF RAILROAD THAT QUALIFIES FOR THE CLASS EXEMPTION FROM 49 U.S.C. § 10901, RATHER THAN TRACK EXCEPTED FROM BOARD ACQUISITION AND OPERATION AUTHORITY UNDER § 10906

Affton Trucking Company leases the St. Louis Transload Facility trackage from Affton Properties, L.L.C.. The trackage is used in conjunction with interchanging to and from Terminal

Railroad Association of St. Louis, and also Burlington Northern Santa Fe Railroad, carloads of outbound grains and related products as well as plastic pellets and related products after transloading, and inbound carloads for transloading into trucks for final delivery.

There is currently 10,560 linear feet of track located on the St. Louis Transload Facility. There are plans to phase in additional track that Affton Terminal Railroad will operate.

In those circumstances, the St. Louis Transload Facility trackage is properly considered to be a line of railroad under 49 U.S.C. § 10901 pursuant to the Board's tenant-use test, rather than spur, switching or side tracks excepted from Board authority over their acquisition and operation by virtue of 49 U.S.C. § 10906. The tenant-use test is described in the Board's decision denying reconsideration in *Effingham Railroad Company - Petition for Declaratory Order - Construction at Effingham, IL*, STB Docket No. 41986 and embraced proceedings, 1998 STB LEXIS 253, decision served September 18, 1998; *aff'd sub nom. United Transp. Union v. Surface Transportation Board.*, 183 F.3d 606 (7th Cir. 1999).

In that case, as here pertinent, Agracel Corporation transloaded beer from rail to truck at a warehouse that it operated in an industrial park at Effingham, IL. Agracel owned approximately 206 feet of right-of-way and track that extended between its warehouse and trackage owned and operated by Conrail. Previously, Conrail had operated over the Agracel trackage to provide service to Agracel. It was proposed that Effingham Railroad Company (ERRC), a noncarrier, substitute for Conrail as provider of the rail service over the Agracel trackage. ERRC filed a notice of exemption under 49 C.F.R. § 1150.31 for its operation over that trackage. The United Transportation Union (UTU) contended that the Board lacked authority over the proposed operation because Agracel trackage is spur, switching or side track excepted from Board operation authority under 49 U.S.C. § 10906.

In finding that the Agracel trackage was a line of railroad under 49 U.S.C. § 10901, the Board said (1998 STB LEXIS 253, at 8-9 (emphasis in original)):

...(I)n those cases where a tenant railroad's intended use of a track segment is different from the use made by the railroad owning the track, we have determined that the tenant's use, rather than the character of the trackage itself, is controlling with regard to its own operations, subject to consideration of the purpose and effect of the construction under *Texas & Pacific* (citations omitted).

In the initial notice, even under its new approach, ERRC became the operator of a line of track connecting Conrail to the site of the industrial park. Conrail clearly had operated this short track segment as an exempt siding or spur. However, because it was ERRC's initial railroad operation, this track segment became ERRC's entire line of railroad and was not, as to ERRC, a siding or spur. This small piece of trackage initiated ERRC's service from a connection or interchange point with Conrail to a shipper's facility within the industrial park. Thus ERRC's becoming the operator was the proper subject of the initial notice of exemption and was not statutorily exempt under section 10906.

It is apparent from the Board's decision in that case that the tenant-use test also applies when a new rail carrier is using trackage pursuant to an operating agreement rather than a lease, and when the prior use of the track was by a third-party carrier rather than by the shipper-owner of the trackage. In upholding the Board's decision in that case, the reviewing court held that it was reasonable for the Board to classify the trackage by virtue of the tenant's use. *United Transp. Union vs. Surface Transportation Bd.*, *supra*. 193 F.3d at 614. *Accord: Chicago Rail Link LLC - Lease & Oper. - Union Pacific R.R. Co.*, 2 S.T.B. 534 (1997), *aff'd sub nom. United Transp. Union - Illinois v. Surface Transp.*, 169 F.3d 474 (7th Cir. 1999).

Inasmuch as the subject transaction will be ATRR's initial railroad acquisition, and the St. Louis Transload Facility trackage will constitute the entire line of railroad of ATRR, it follows that the St. Louis Transload Facility trackage is a line of railroad under 49 U.S.C. § 10901, rather than spur, switching or side tracks excepted from Board acquisition and operation authority by virtue of 49 U.S.C. § 10906.

INFORMATION REQUIRED BY 49 C.F.R. § 1150.33

(a) The full name and address of the applicant;

The full name and address of the applicant in Finance Docket Number 35390 is Affton Terminal Railroad Company, 420 Gimblin Road, St. Louis, Missouri, 63147.

(b) The name, address, and telephone number of the representative of the applicant who should receive correspondence;

ATRR representative is David C. Dillon, Dillon & Nash, Ltd., 111 West Washington Street, Suite 719, Chicago, Illinois, 60602, 312-782-9025.

(c) A statement that an agreement has been reached or details when an agreement will be reached;

An agreement between Affton Trucking Company and Affton Terminal Railroad Company concerning the St. Louis Transload Facility trackage will be reached within thirty (30) days, and an agreement in principle has been reached. (A copy of a draft Operating Agreement (or Lease) is provided herewith.)

(d) The operator of the property;

ATRR will be the operator of the property.

(e) A brief summary of the proposed transaction, including:

(1) The name and address of the railroad transferring the subject property,

The above entity in Finance Docket Number 35390 is Affton Trucking Company, Inc., a non-railroad corporation, 420 Gimblin Road, St. Louis, Missouri, 63147.

(2) The proposed time schedule for consummation of the transaction,

The operating agreement and operation are proposed to be consummated prior to March 1, 2012, provided that this notice of exemption has been filed at least fifteen days prior to that date.

(3) *The mile-posts of the subject property, including any branch lines, and*

The St. Louis Transload Facility trackage is not described by milepost numbers. That trackage is described and depicted in Appendix 1-A and 1-B attached to this Notice.

(4) *The total route miles being acquired;*

A total of approximately 10,560 feet/ 2 mile(s) of trackage is to be operated under an operating agreement.

(f) *A map that clearly indicates the area to be served, including origins, termini, stations, cities, counties, and States;*

The required map is attached to this Notice as Appendix 1-B.

(g) *A certificate that applicant's projected revenues do not exceed those that would qualify it as a Class III carrier.*

The required certificate is attached to this Notice as Appendix 2.

CAPTION SUMMARY

A caption summary required by 49 C.F.R. § 1150.34 for Finance Docket Number FD35390 is attached to this Notice as Appendix 3.

ENVIRONMENTAL AND HISTORIC REPORT

The proposed acquisition and operation do not require environmental and historic reporting. See 49 C.F.R. § 1105.6(c)(2)(i) and 49 C.F.R. § 1105.8(b)(1).

LABOR PROTECTION

Pursuant to 49 U.S.C. § 10901(c), labor protection requirements do not apply to this transaction.

VERIFICATION

The verification is attached to this Notice as Appendix 4.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, within 30 days of the filing of this Notice, the Director of the Board's Office of Proceedings should publish notices in the Federal Register of the filing of notices of exemption in Finance Docket No. 35390. See 49 C.F.R. § 1150.32(b).

Respectfully submitted,

By: David C. Dillon
Dillon & Nash, Ltd.
111 West Washington Street
Suite 719
Chicago, Illinois 60602
(312) 782-9025

Affton Terminal Railroad Company

*Attorney for Applicant
in Finance Docket No. FD 35390*

Applicant in Finance Docket No. FD 35390

DATE FILED: March 1, 2012

Finance Docket Number: FD 35390

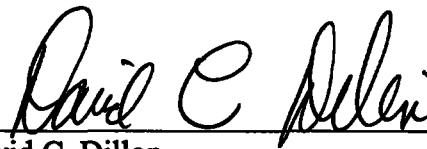
Appendix 1-A

**LENGTH OF AFFTON TERMINAL RAILROAD
ST. LOUIS TRANSLOAD FACILITY**

Total Track: 10,560 linear feet = 2 miles of track

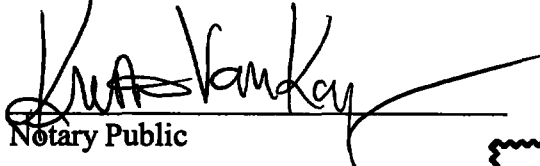
CERTIFICATION UNDER 49 C.F.R. § 1150.33(g)

Afton Terminal Railroad hereby certifies under 49 C.F.R. § 1150.33(g), that the projected revenues from the acquisition and operation proposed in this matter do not exceed those that would qualify it as a Class III rail carrier.



David C. Dillon
*Authorized Representative of
Afton Terminal Railroad*

SUBSCRIBED AND SWORN TO before
me this 1st of March, 2012.


Notary Public

CAPTION SUMMARY

SURFACE TRANSPORTATION BOARD

Notice of Exemption

FINANCE DOCKET NO. FD 35390

**AFFTON TERMINAL RAILROAD COMPANY
- ACQUISITION EXEMPTION -
RAIL LINE OF AFFTON LOGISTICS, INC.
AT ST. LOUIS TRANSLOAD FACILITY, ST. LOUIS, MISSOURI**

Affton Terminal Railroad Company (ATRR), has filed a Notice of Exemption to acquire and operate from Affton Logistics, Inc., a non-carrier, approximately 2 miles of right-of-way and trackage at Affton Trucking Company's St. Louis Transload Facility in St. Louis, Missouri. Comments must be filed with the Board and be served on ATRR's representative, David C. Dillon, Dillon & Nash, Ltd., 111 W. Washington Street, Suite 719, Chicago, IL, 60602, (312) 782-9025.

This Notice is filed under 49 C.F.R. § 1150.31. If the Notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. §10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

By the Board


(Seal)

Vernon A. Williams, Secretary

VERIFICATION


STATE OF ILLINOIS)
)
COUNTY OF COOK)

David C. Dillon, being duly sworn, states that he is an attorney for Affton Terminal Railroad Company; that he is familiar with the factual allegations made in the foregoing Notice of Exemption on behalf of ATRR; and that such allegations are true as stated.



David C. Dillon, Attorney for
Affton Terminal Railroad Company

SUBSCRIBED AND SWORN to before
me this 1st day of March, 2012.



Notary Public



THIS AGREEMENT CONTAINS AN AUTOMATIC RENEWAL PROVISION

OPERATING AGREEMENT

THIS AGREEMENT, made and entered into as of the 1st day of November, 2011, between AFFTON TRUCKING COMPANY (ATC) and AFFTON TERMINAL RAILROAD COMPANY (ATRR).

WITNESSETH:

WHEREAS, ATRR has acquired by Access Agreement from Affton Terminal Railroad approximately two (2) miles of right-of-way and trackage located at ATC's St. Louis Transload Facility, in St. Louis, Missouri, more particularly described in Appendix 1 attached hereto ("the St. Louis Transload Facility trackage"); and

WHEREAS, ATRR desires to operate and maintain the St. Louis Transload Facility trackage for the provision of rail service in the name of, and in behalf of, ATC; and

WHEREAS, ATC is agreeable to such operation and maintenance upon the terms and conditions herein contained.

NOW, THEREFORE, in consideration of the covenants and conditions contained herein the parties hereto agree as follows:

ARTICLE ONE

**GRANT OF RIGHT TO OPERATE AND
MAINTAIN THE
ST. LOUIS TRANSLOAD FACILITY TRackage**

Subject to the terms and conditions provided in the Access Agreement between ATC and Affton Terminal Railroad, (i) Affton hereby grants to ATRR the right to operate its trains, locomotives, cars, and equipment with its crews over the St. Louis Transload Facility trackage for

the purpose of providing rail service to shippers and receivers located on such lines and to transport shipments by rail over such lines, and to maintain the St. Louis Transload Facility trackage, and (ii) ATRR agrees to operate and maintain the St. Louis Transload Facility trackage. ATRR reserves the right to operate trains, locomotives, cars, and equipment on an as-needed basis, using a leased locomotive or a substitute, using its own personnel. ATRR will perform all necessary freight car switching at the St. Louis Transload Facility and will operate all freight car loading and unloading facilities.

ARTICLE TWO

TERM; TERMINATION

Section 2.01 Term. Subject to earlier termination as provided herein, the term of this Agreement shall be one year from the date of this Agreement shown above; provided, however, that this Agreement will be renewed automatically for additional one year periods unless, no later than 60 days before its expiration, either ATC or ATRR provides written notice to the other party of its intent not to renew this agreement.

ATC may terminate this Agreement upon ten (10) calendar days written notice if by any reason most of the circulating shares in ATRR with right to a vote are no longer property of Affton Trucking, or its parent or affiliated companies, or if any shares in ATRR are owned, directly or indirectly, by a competitor of Affton Trucking.

Section 2.02 Termination For Default. Either party may terminate this Agreement by written notice if the other party fails to perform any obligation required of it hereunder and fails to remedy such default within thirty (30) days after receipt of written notice of such default.

Section 2.03 Termination for Bankruptcy, Etc. Either party may immediately terminate this Agreement by written notice if the other party enters into or is placed in bankruptcy or receivership or is nationalized, become insolvent, or makes an assignment for the benefit of its creditors.

ARTICLE THREE

SCOPE OF OPERATIONS AND MAINTENANCE AND COMPENSATION THEREFORE

The scope of operations and maintenance and the agreed compensation therefore are contained in Appendix 2 attached hereto. The parties may amend Appendix 2 from time to time by executing an amended scope of operations and maintenance and compensation.

ARTICLE FOUR

GOVERNMENT APPROVAL, ETC.

ATRR at its own expense shall obtain any and all governmental approvals, authorizations, permits, licenses, and exemptions that may be required for its operation and maintenance of the St. Louis Transload Facility trackage.

ARTICLE FIVE

INSURANCE

ATRR shall be required to obtain and keep in force a commercial general liability insurance policy covering ATRR's operation and maintenance of the St. Louis Transload Facility trackage, including public liability, personal injury, property damage, and contractual liability with per occurrence and aggregate limits of not less than \$2 million. ATC shall be named as an additional insured in such policy. Upon reasonable request, ATRR shall make such policy available for inspection and review by ATRR.

ARTICLE SIX

MANAGEMENT AND OPERATIONS

ATRR shall comply with the provisions of the Federal Safety Appliance Act, as amended, and all other federal, state, and local laws, regulations and rules respecting (i) the operations and maintenance of the St. Louis Transload Facility trackage, (ii) the operation, condition, inspection and

safety of ATRR's trains, locomotives, cars, and equipment while such trains, locomotives, cars, and equipment are being operated over the St. Louis Transload Facility trackage. ATRR shall indemnify, protect, defend, and save harmless ATC and its officers, agents and employees from and against all fines, penalties and liabilities imposed upon ATRR or its officers, agents and employees under such laws, rules and regulations by any public authority or court having jurisdiction in the premises, when attributable in any manner to the failure of ATRR to comply with its obligations under this article.

ARTICLE SEVEN

LIABILITY AND INDEMNITY

Whenever any loss of, damage to, or destruction of any property whatsoever, or injury or death of any person or persons whomsoever, occurs with the trains, locomotives, cars, or equipment of, or in the account of ATRR, ATRR shall assume all liability therefore, and shall forever protect, defend, indemnify and save harmless ATC and its officers, agents and employees from and against any such liability, cost and expense, except if such loss, damage, injury or death was caused by ATRR.

ARTICLE EIGHT

ENVIRONMENTAL CONDITIONS

ATC shall indemnify ATRR for any and all Losses resulting from environmental conditions existing on the St. Louis Transload Facility trackage as of the commencement of operations by ATRR. ATRR shall indemnify ATC for any and all Losses resulting from environmental conditions occurring or arising on the St. Louis Transload Facility trackage during the term of this Agreement except to the extent caused by the act or omission of ATC.

ARTICLE NINE

THIRD PARTY CLAIMS RELATING TO

OWNERSHIP OPERATION

ATTR shall not cause any lien, claim, or encumbrance to be placed against the St. Louis Transload Facility trackage. If any such lien, claim or encumbrance shall be filed or placed against the St. Louis Transload Facility trackage or any part thereof, ATTR agrees to discharge the same within 30 days after ATTR has notice thereof. If ATTR fails to do so, ATC shall have the right (but not the obligation) to pay or discharge any such liens, claims or encumbrances without inquiry as to their validity and any amount so paid, including interest, fees, charges, and expenses, shall be paid by ATTR to ATC, as applicable.

ARTICLE TEN

FINANCIAL STATEMENTS

If ATC shall so request, ATTR shall be required on a quarterly basis to provide statements reflecting its financial condition, such as a balance sheet and profit-loss statement.

ARTICLE ELEVEN

CONFIDENTIALITY

ATTR will keep secret and confidential at all times and will not disclose, divulge, or communicate any confidential or proprietary information provided by ATC hereunder, in any manner, directly or indirectly, to any third party, except as permitted by this Agreement, and except where that information:

- (a) is or later become publicly known under circumstances involving no breach of this Agreement by ATTR;
- (b) was already known to ATTR at the time it was received from ATC, not under an obligation of confidentiality, as evidenced by written documents in the possession of ATTR; or

- (c) is made available to ATRR by a third party without secrecy obligations and without breach of an obligation to ATC.

ATRR may disclose confidential information only to those of its directors, officers, and employees who legitimately require it for the purposes permitted by this Agreement, and will use its best efforts to prevent any unauthorized disclosure by them.

Notwithstanding the termination of this Agreement, the obligations of ATRR under this Section 11 shall continue in force for ten (10) years after termination.

ARTICLE TWELVE

REAL PROPERTY TAXATION

ATRR agrees to file Missouri Department of Revenue Railroad Property Tax Forms, listing the St. Louis Transload Facility property as "railroad operating property" as defined in the applicable Missouri statutes. ATRR shall pay the resulting property taxes or immediately fully reimburse ATC if ATC pays such taxes.

ARTICLE THIRTEEN

AMENDMENTS

This Agreement represents the entire understanding between the parties and supersedes and replaces any and all prior agreements between the parties relating to the subject matter hereof. This Agreement may not be amended except by a written instrument signed on behalf of each party by its authorized representatives.

ARTICLE FOURTEEN

ASSIGNMENT

Neither party may assign this Agreement without the prior written consent of the other, except that ATC may assign this Agreement to any entity which succeeds, by sale, merger,

acquisition, transfer, or otherwise, to all or substantially all of its assets or business at its St. Louis Transload Facility.

ARTICLE FIFTEEN

MISCELLANEOUS

Section 15.01 Any notices, requests, or other communications hereunder shall be in writing and shall be deemed to have been duly given when made upon a party by personal service at any place where they may be found or by mailing such notices, requests, or communications by certified mail, postage prepaid and return receipt requested, or by nationally recognized courier, or by transmitting such notice by facsimile, in each case to the following addresses or facsimile numbers, as the case may be:

- (a) If to ATC: Affton Trucking Company
421 Gimblin Road
St. Louis, Missouri 63147
Attention: President
- (b) If to ATRR: Christopher Wright
Address to be supplied

Either party may provide changes in the above addresses to the other party by a notice given to the other party in this Section 15.01.

Section 15.02 Governing Law. This Agreement shall be construed and enforced in accordance with the laws of the State of Missouri.

Section 15.03. Severability. If any provision in this Agreement shall for any reason be determined to be invalid or unenforceable, the balance of such provision and the remaining provisions of this Agreement shall nevertheless continue to be valid and enforceable as though the invalid or unenforceable provision had not been a part hereof.

Section 15.4 Titles. The title of the sections and subsections of this Agreement are for convenience of reference only and are not to be considered in construing this Agreement.

IN WITNESS WHEREOF, this Agreement has been executed by the parties hereto on the day and year first above written.

Affton Trucking Company

By: _____
Authorized Representative

Affton Terminal Railroad Company

By: _____
Authorized Representative

APPENDIX 1

ST. LOUIS TRANSLOAD FACILITY TRACKAGE

Total Track: 10,560 linear feet = 2 miles of track

Common Address of Facility: 421 Gimblin Road
St. Louis, Missouri

APPENDIX 2

SCOPE OF WORK

AFFTON TRUCKING COMPANY (ATC) and AFFTON TERMINAL RAILROAD COMPANY (ATRR) hereby agree to the following scope of work in accordance with Article Three of the Operating Agreement between them made and entered into as of March 1, 2012.

A. Operation

ATRR will furnish a properly trained and qualified locomotive engineer and railroad switchman (collectively, operating crew) or a crew consisting of qualified remote control operators (as qualified and certified according to federal transportation standards) to provide railroad switching service at the St. Louis Transloading Facility, St. Louis, Missouri (work site). It is expected that the operating crew will work eight hours a day, Monday through Friday (full time) or as required. If such railroad switching service does not occupy that number of hours of operation on any day, the operating crew shall utilize the remaining hours of any such day doing one or more of the following activities: (1) hand check track gauge within all tracks and turnouts; (2) clean and lubricate moving parts of all switches; (3) hand check bolts within switch and track area; (4) perform other railroad-related projects as needed. At the reasonable request of ATC from time to time, the operating crew will work a greater number of hours per day than the numbers identified above.

ATRR will furnish a locomotive capable of performing the railroad switching service identified above. ATRR will maintain that locomotive in such manner that it is in condition adequate to perform the rail switching service identified above. ATRR will provide for use by operating crew: (1) a contractor vehicle with small tools and a generator; and (2) a set of hand radios.

B. Maintenance

The operating crew will perform light track maintenance and daily inspection of the trackage at the work site. ATRR will provide sufficient properly trained and qualified maintenance personnel to perform other maintenance activity, as needed (collectively, maintenance crew). The number of persons in a maintenance crew will vary depending on the maintenance work to be done. However, in most cases, a maintenance crew will consist of four persons. ATRR will provide equipment and tools as required for maintenance activity.